

COLORADO SUPREME COURT 2 East 14th Avenue, Denver, Colorado 80203	
Original Proceeding Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
Petitioner: Brenda Dickhoner v. Respondents/Proponents: Lea Steed and Donald "DJ" Anderson and Title Board: Theresa Conley, David Powell, and Ed DeCecco	<input type="checkbox"/> COURT USE ONLY <input type="checkbox"/>
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Petitioner's Opening Brief	

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of Colorado Appellate Rules 28 and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in Colorado Appellate Rule 28(g).

It contains **1,629** words (opening brief does not exceed 9,500 words).

The brief complies with the standard of review requirements set forth in Colorado Appellate Rule 28(a)(7)(A).

For each issue raised by Petitioner, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of Colorado Appellate Rules 28 and 32.

s/ Gwendolyn A. Benevento

Gwendolyn A. Benevento

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Does the title of Proposed Initiative 2021-2022 #63 (Initiative #63) violate Colo. Rev. Stat. § 1-40-106(3)(b) because it is misleading and unclear?

STATEMENT OF THE CASE

This is an original proceeding pursuant to section 1-40-107(2), C.R.S. Respondents filed Initiative #63 concerning additional dedicated revenue to the state education fund with the Secretary of State on April 3, 2022. The Title Board conducted its initial public hearing and set the title for Initiative #63 on March 16, 2022. Petitioner filed a motion for rehearing on March 23, 2022, alleging that Initiative #63 contained multiple subjects and that the title set was unclear and misleading. The Title Board considered the motion at its April 6, 2022, hearing where the Title Board granted the motion only to the extent that it made a change to the title and ballot title and denied the remainder of the motion.

Initiative #63 would require an additional defined percentage of state revenue to be appropriated to the state education fund. Its provisions address use of the funds and would exempt those funds from taxpayer refund requirements as a voter-approved revenue change under section 20(7)(d) of article X of the state constitution (TABOR).

The Title Board set the final ballot title for the Initiative #63 (Title) as

follows:

A change to the Colorado Revised Statutes concerning additional funding for preschool through twelfth-grade public education, and, in connection therewith, without raising the existing state income tax rate, requiring revenue collected by the state from one-third of one percent of all federal taxable income of every individual, estate, trust, and corporation, as modified by law, to be deposited in the state education fund; allowing the additional revenue to be from revenue that the state or a local school district is otherwise required to refund to taxpayers in years in which a refund is due; requiring the additional revenue to be used for attracting, retaining, and compensating teachers and student support professionals; specifying appropriations of the additional revenue do not supplant existing appropriations for public education; and requiring an annual report describing the allocation of the additional revenue.

Petitioner seeks review of the Title Board's action under Colo. Rev. Stat.

§ 1-40-107(2).

SUMMARY OF THE ARGUMENT

Petitioner disagrees with the Title set by the Title Board because it is misleading and unclear. The Title should be corrected before the measure is presented to voters.

ARGUMENT

I. Standard of review.

The Title Board has broad discretion in “the exercise of its drafting authority.” *In re Title, Ballot Title, Submission Clause for 2001-2002 #21 & #22*, 44 P.3d 213, 219 (Colo. 2002). However, the Court may “reverse the Title Board's decision if the Titles are ‘insufficient, unfair, or misleading.’” *Kemper v. Leahy (In re Title, Ballot Title and Submission Clause for 2011-2012 #45)*, 328 P.3d 172, 176 (Colo. 2014), citing *In re Title, Ballot Title & Submission Clause for 2009-2010 #45*, 234 P.3d 642, 648 (Colo. 2010).

II. The Title set for Initiative #63 is misleading and unclear.

A. The Title is misleading because it states that additional funding is provided “without raising the existing state income tax rate,” however, the measure will result in an increase in income taxes in TABOR refund years.

The constitution requires an initiated measure’s subject to be “clearly expressed in its title.” Colo. Const. art. V, § 1(5.5). “In setting a title, the title board shall consider the public confusion that might be caused by misleading titles.” Colo. Rev. Stat. § 1-40-106(3)(b). The clear title requirement seeks to “prevent voter confusion and ensure that the title adequately expresses the initiative's

intended purpose.” *Robinson v. Dierking (In re Title, Ballot Title & Submission Clause for 2015-2016 #156)*, 413 P.3d 151, 153 (Colo. 2016). Voters, "whether or not they are familiar with the subject matter of a particular proposal," should be able to "determine intelligently whether to support or oppose the proposal." *Id.*, citing *In re 2015-2016 #73*, 369 P.3d 565, 568 (Colo. 2016).

Initiative #63 increases the income tax (and consequently the percentage rate of income tax) paid by taxpayers in TABOR refund years. In years where state revenue from sources not excluded from fiscal year spending exceed TABOR limits, the excess shall be refunded. Colo. Const. art. X, § 20(7)(d). Initiative #63 would allow the revenue diverted to the state education fund to be retained and spent by the state as a voter-approved revenue change under Colo. Const. art. X, § 20(7)(d).¹ This provision functions as an “offset” to the state’s otherwise applicable refund obligation. *Havens v. Bd. of County Comm’rs*, 924 P.2d 517, 522 (Colo. 1996). As a result, this measure would reduce the amount of refund that would otherwise be paid to taxpayers in years where refunds are due.

¹ See Initiative #63, Section 3 proposing adding C.R.S. § 22-55-102.3(2).

The assertion in the Title that funding is provided “without raising the existing income tax rate” implies that the measure will not increase the amount of income tax paid by taxpayers. Because of this Title, voters would be confused to learn that it does indeed increase their income tax payment obligation in certain years. The Title as written limits voters’ ability to determine intelligently whether to support or oppose the measure because it includes this unnecessary statement that the measure will not raise the existing income tax rate, which is not a clear or fair explanation of how the measure would affect income taxes in all years. Therefore, the Title set for Initiative #63 is misleading in contravention of C.R.S. § 1-40-106(3)(b).

B. The Title is unclear because providing funds “without raising the existing state income tax rate,” is not a central feature of the measure and it is not an unambiguous statement of the principle of any provision in the measure.

A title shall correctly and fairly express the true intent and meaning of the proposed measure and “shall unambiguously state the principle of the provision sought to be added, amended, or repealed.” Colo. Rev. Stat. § 1-40-106(3)(b), *In re the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #29*, 972 P.2d 257, 266 (Colo. 1999). The Title Board is tasked with “focusing on the most critical aspects of the proposal, not simply [restating] all of the provisions of

the proposed initiative.” *Percy v. Embury (In re Title for 1999-2000 #235(a))*, 3 P.3d 1219, 1225 (Colo. 2000), citing *In re Petition on Campaign and Political Finance*, 877 P.2d 311, 313 (Colo. 1994). A Title is required to “summarize the central features of a proposed initiative fairly, but it ‘need not explain the meaning or potential effects of the proposed initiative on the current statutory scheme.’” *Haynes v. Vondruska (In re Title, Ballot Title & Submission Clause for 2019–2020 #315)*, 500 P.3d 363, 369 (Colo. 2020), citing *In re 2015-2016 #73*, 369 P.3d at 569 (Colo. 2016) and *In re Petition on Campaign and Political Finance*, 877 P.2d at 315 (noting that the Board need only “fairly summarize the central points of a proposed measure”).

A fair title may not include language that is “likely to create prejudice, either for or against the measure.” *In re the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #29*, 972 P.2d at 266. Also, titles are required to be brief. C.R.S. § 1-40-106(3)(b), *In re Second Initiated Constitutional Amendment*, 613 P.2d 867 (Colo. 1980). The title is intended to be “a relatively brief and plain statement ... that sets forth the central features of the initiative.” *Matter of Title, Ballot Title for 1997-98 #62*, 961 P.2d 1077, 1083 (Colo. 1998).

Assuming the phrase “without raising the existing state income tax rate” were accurate and not misleading, it does not relate to a central feature of the measure, in fact, it is not a feature of the measure at all. Nothing in the text of Initiative #63 refers to the effect on the state income tax rate. This phrase explains just one of the many things the initiative does not have an effect upon, for example, within the same category the Title could state that the measure does not increase the sales tax rate, property tax rate, fees, or any other source of state income. The Title strays far from focusing on the most critical aspects and central features of the proposal by including a phrase that attempts to explain the potential effects of the proposed initiative on the current income tax rate. The Title is unclear because of its ambiguous statement of an effect outside of the measure’s provisions and unrelated to any feature of Initiative #63. Furthermore, allowing title language to describe favorable effects outside of a measure’s provisions will certainly and unnecessarily frustrate brevity in every case.

Finally, the inclusion of this phrase appears to have the sole purpose of persuading voters to support this measure by stating something people generally like to hear, that it will not raise income taxes, and, therefore, likely creates prejudice for the measure.

CONCLUSION

The Title Board erred in denying Petitioners' motion for rehearing and objections raised at the Title Board hearing on April 6, 2022. Accordingly, Petitioners respectfully request that the Court reverse the actions of the Title Board and order Initiative #63 to be returned to the Respondents on grounds that the Title for Initiative #63 is misleading and unclear. Alternatively, Petitioners respectfully request that the Court reverse the actions of the Title Board and remand Initiative #63 to the Title Board for redrafting to remove the phrase "without raising the existing state income tax rate" from the Title.

Dated: May 3, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2020, I electronically filed a true and correct copy of this **Petitioner's Opening Brief** with the Clerk of Court via the Colorado Courts E-Filing System which will send notification of such filing upon counsel of record:

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